IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2017-0186
Plaintiff-Appellant,	:	
	:	On Appeal from the Montgomery
vs.	:	County Court of Appeals
	:	Second Appellate District
JAMES DUNSON,	:	
	:	C.A. Case No. 26990
Defendant-Appellee.	:	

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE SOUTHERN POVERTY LAW CENTER, AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, IN SUPPORT OF APPELLEE JAMES DUNSON

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The American Civil Liberties Union of Ohio Foundation

The American Civil Liberties Union of Ohio Foundation (ACLU of Ohio) is a statewide non-profit, non-partisan organization with over 30,000 members, dedicated to defending the civil liberties of all Ohioans. The ACLU of Ohio is committed to fighting abuses in the prison-industrial complex and working against the criminalization of poverty. In its litigation, policy, and grassroots advocacy, the ACLU of Ohio aims to ensure that those involved in Ohio's criminal justice system receive due process and equal protections of the laws, and are supported through successful reentry.

The American Civil Liberties Union Foundation

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, non-profit, non-partisan organization of more than 1 million members dedicated to defending the civil liberties guaranteed by the Constitution. The Racial Justice Program ("RJP") of the ACLU is dedicated to combating the structural drivers of racism and inequality and works to end discrimination in the criminal justice system, education, housing, police profiling, and lending. RJP leads litigation and advocacy in multiple states aimed at protecting the rights of poor people in the criminal justice system, including challenges to unlawful incarceration for inability to pay fines and fees.

The Southern Poverty Law Center

The Southern Poverty Law Center (SPLC) is a non-profit organization founded in 1971 to advance and protect the rights of minorities, the poor, and victims of injustice in significant civil rights and social justice matters. The Economic Justice Project, as part of the SPLC's legal department, seeks to address the unique systematic barriers faced by people living in or on the

edge of poverty in the Deep South. SPLC has commenced litigation and led policy efforts to help courts reform abuses caused by excessive court costs and excessive punishments related to unpaid court costs.

The Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization, formed in 1963 by leaders of the American bar, at the request of President John F. Kennedy, in order to mobilize the private bar in vindicating the civil rights of African-Americans and other racial minorities. The Lawyers' Committee is dedicated, among other goals, to preventing the criminalization of poverty, ending mass incarceration, and securing criminal justice reform through impact litigation and other means.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of facts set forth in the merit brief of Appellee James Dunson.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

James Dunson will be imprisoned for at least 18 years in the Warren Correctional Institution. He is indigent, earning less than $40 per month through full-time work as a prison laborer—an amount far less than the applicable federal poverty guideline of $1200 per month. Yet the trial court inexplicably refused to consider Dunson's ability to pay when it denied his motion to modify the court costs imposed to pay for his constitutional right to a jury trial. Because of this, each month the Clerk of the Montgomery County Court garnishes virtually all of Dunson's meager commissary account, leaving him unable to purchase basic necessities like food, medicine, and personal hygiene items. At this rate, when Dunson is released, he will have no saved wages and will reenter society not only destitute, but likely still indebted to the State.

This Court has been clear and steadfast in recognizing the importance of evaluating a criminal defendant's ability to pay court costs in preserving due process and equal protection of the law. In fact, this Court issued powerful guidance reaffirming this principle as recently as this month, stating:

> [C]ourt cases are not business transactions. We do not buy and sell a commodity; we perform a public service * * * the courts' fundamental and unquestionable responsibility is to ensure that justice is done. We should not be expected to engage in practices designed to maximize revenue by taking advantage of our citizens or ignoring basic constitutional standards.

Letter of Chief Justice O'Connor to all state Judges, Jan. 30, 2018 (attached as Exhibit A).

The Second District Court of Appeals applied these accepted principles to Dunson's case below to require that a trial court, when deciding a motion to modify costs, must take the constitutional and commonsense step of considering whether that person currently is, or is likely

to become, able to pay. Reversal would confound the purpose of R.C. 2947.23, would present serious constitutional concerns, and would exaggerate cycles of poverty and incarceration in Ohio. Amici urge this Court to uphold the Second District's reasonable decision and hold that R.C. 2947.23(C) requires consideration of ability to pay.

Proposition of law: trial courts must consider ability to pay on a post-conviction motion to modify costs, as a matter of statutory and constitutional law and public policy.

A. REFUSING TO CONSIDER ABILITY TO PAY IS UNREASONABLE, ARBITRARY, AND CAPRICIOUS.

Trial courts abuse their discretion when they fail to consider present and future ability to pay on a motion to waive, modify, or suspend court costs under R.C. 2947.23(C). The purported purpose of assessing costs to convicted criminal defendants is to mitigate taxpayer burden. Where a defendant is indigent and will remain indigent for the foreseeable future, attempts at collection are either unavailing and impose undue hardship. Continuing attempts to collect will therefore have no effect other than to harm the defendant. Since assessment of court costs may not be a punitive measure, courts must consider ability to pay when deciding whether those costs can be collected. Decisions that fail to do this are unreasonable, arbitrary, and capricious.

1. Present and future ability to pay are necessary considerations, relevant to the purpose of imposing court costs on defendants.

This Court recently held that the purpose of assessing court costs is to "lighten * * * the burden on taxpayers financing the court system." *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164 at ¶15. For that reason the Court explained that "costs are not punishment, but are more akin to a civil judgment for money." *Id; see also State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278 at ¶ 20. It follows that any court decision on a motion to modify costs must be calculated to achieve R.C. 2947.23's purpose: recouping taxpayer dollars. Where a defendant can pay only nominal installments of costs at most, and

there is little likelihood that his circumstances will change, extracting what money he does have is punitive. Without considering ability to pay, a trial court cannot know whether it is achieving R.C. 2947.23's goal.

Courts routinely modify cost orders on this basis. *See, e.g., State v. Rowe*, 197 Ohio App.3d 10, 2011-Ohio-6614, 965 N.E.2d 1047, ¶ 8-9 (4th Dist.) (finding ineffective assistance of counsel in failing to file motion to waive costs where record showed probability that court would have waived costs given defendant's indigency status and unchanged financial circumstances); *see also State v. Hawthorne*, Sixth Dist. Lucas Nos. L–03–1120, L–03–1127, 2005-Ohio-1553, ¶ 74; *State v. Smith*, Warren App. No. CA2010–06–057, 2011-Ohio-1188 ¶ 64 ; *State v. Hicks*, 8th Dist. Cuyahoga No. 105083, 2017-Ohio-8312, ¶ 18.

When courts fail to consider ability to pay, the result is purely punitive. The trial court, in its summary denial of Dunson's motion, candidly stated as much:

> Defendant made the choices which led to the accrual of the fees at issue, and he must take responsibility for his conduct, as well as the resulting consequences.
>
> *State v. Dunson*, 2d. Dist. Montgomery No. 12-CR-1191/2, 2017-Ohio-0186.

The trial court's findings—the "choices" Dunson made and the "responsibility" that he should take—reveal that the court denied Dunson's motion because of his criminal conviction. As such, its purpose for denial was punitive, rather than an effort to recoup taxpayer dollars.[1]

[1] The trial court attempted to justify the denial by stating—incorrectly—that Dunson did not present any evidence of present or future inability to pay. But Dunson did present credible evidence in the form of an affidavit averring that his monthly expenses exceeded the money left in his prison account after cost garnishment.

All of this matters for two reasons. First, trial courts cannot be allowed to assess costs for punitive reasons, and they require guidance on this point.[2] Second, ability to pay is fundamentally relevant to a motion to modify costs.

2. The Court must interpret an ambiguous statute to preserve its purpose, and the Second District reasonably did so here.

The Second District reasonably interpreted R.C. 2947.23(C) to require an ability to pay determination. The statute is silent on what "continuing jurisdiction" means and how it should be effectuated, and the court provided correct guidance where the statute did not. *See State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, 30 N.E.3d 918, ¶ 37 (2015) (a court's role in interpreting statutes is to "determine legislative intent by looking to the language of the statute and the purpose to be accomplished by the statute." (internal citations omitted).

The State would have this Court believe that under R.C. 2947.23(C)'s plain language, "trial courts are not required to do more than *retain* jurisdiction to waive, suspend, or modify the payment of costs." Merit brief of State-Appellant at 4 (emphasis added). This construction is perplexing—it is hard to imagine what the State thinks continuing jurisdiction would be for, if not to be put to good use determining which costs can be repaid and collected from defendants. This Court must reject the State's interpretation because it would render R.C. 2947.23(C)

[2] In Amici's review of decisions under R.C. 2947.23(C), they found trial courts and even appellate courts misapplying this analysis for punitive reasons. For instance, the Eighth District seems not to have apprehended *Threatt*'s holding that court costs should not be punitive. *See State v. Bonton*, 8th Dist. Cuyahoga No. 102918, 2016-Ohio-700, ¶ 18-20 (upholding clearly punitive imposition of court costs in light of the trial court's statements at sentencing: "[a]nd also as part of the punishment here, you're going to have to pay the costs of the prosecution, the cost of the attorney fees. * * * It's part of your punishment.").

purposeless. *See State v. Gibson*, 2d Dist. Champaign No. 2013-CA-11, 2014-Ohio-136, ¶ 15 ("General Assembly should be presumed not to have created a statutory nullity.")

3. Ohio's administrative grievance procedure under R.C. 5120.133 is not an alternative to consideration of ability to pay under R.C. 2947.23(C).

The State's assertion that Dunson's remedy lies not with the trial court but with the administrative grievance process that allows him to raise exemptions to prison account garnishment through R.C. 5120.133 and R.C. 2329.66, is a red herring that has nothing to do with the Second District's holding or the application of R.C. 2947.23(C) to this case. The potential availability of garnishment exemptions at best provides only limited relief to defendants. The legislature expressly provided individuals with a separate avenue of relief through R.C. 2947.23(C), which allows courts to *permanently* waive, suspend, or modify court costs, potentially stopping garnishment altogether. An exemption statute cannot erase a debt—it merely puts it aside to accrue interest, saddling prisoners like Dunson with overwhelming barriers when exiting prison. Under the plain meaning of R.C. 2947.23(C), a trial court must consider ability to pay when exercising its continuing jurisdiction on a post-conviction motion. As discussed below, any other reading renders the statute constitutionally suspect.

B. COMPELLING CRIMINAL DEFENDANTS TO PAY THE COSTS OF A JURY TRIAL WITHOUT EVALUATING ABILITY TO PAY IS UNCONSTITUTIONAL.

It would violate the U.S. Constitution to require indigent criminal defendants who exercise their right to trial to pay court costs they cannot afford. Courts must balance any State interest in recouping costs against the impact of recoupment on an individual's Sixth Amendment rights. The U.S. Supreme Court "has long been sensitive to the treatment of indigents in our criminal justice system," *Bearden v. Georgia*, 461 U.S. 660, 664, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), and has repeatedly carved out protections to "mitigate the

disparate treatment of indigents in the criminal process." *Williams v. Illinois*, 399 U.S. 235, 241, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). The Court has struck down statutory regimes that imposed undue burdens on the right to trial by jury, *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), and the right to counsel, *James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d. 600 (1972).

The Second District's holding that a trial court should evaluate a defendant's ability to pay when ruling on a post-conviction motion to modify costs is a reasonable and appropriate effort to harmonize Ohio's statutory scheme with constitutional mandates. Indeed, the Second District's decision below is consistent with the broad weight of authority Amici have identified from sister jurisdictions and federal courts. The State's position that such costs may be collected without regard to the hardship imposed on a defendant would create an immediate conflict with the Sixth Amendment and this Court should reject it.

1. A state's cost recoupment structure may not chill the exercise of Sixth Amendment rights and therefore must consider ability to pay.

A law unconstitutionally burdens defendants' Sixth Amendment rights if it unduly pressures defendants to waive the right to trial or right to counsel. In *Jackson*, the Supreme Court outlined the applicable principle: Even where a State's criminal justice objectives are legitimate, "they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." 390 U.S. at 582 (citations omitted). The Court has repeatedly sought to protect the rights of indigent defendants from being chilled due to inability to pay. *See, e.g, Griffin v. Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed. 891 (1956) ("There can be no equal justice when the kind of trial a man gets depends on the amount of money he has.")

In *James v. Strange*, 407 U.S. 128 (1972), and *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), the Supreme Court examined these considerations in the context of

state regimes for recoupment of indigent defense fees. Two principles emerge from these cases: First, recoupment laws violate the Equal Protection Clause if they fail to provide indigent defendants the same exemptions other civil debtors enjoy. Second, even where indigent defendants receive the same exemptions as other debtors, recoupment laws may *still* violate the Sixth Amendment if they pressure indigents to forgo counsel by failing to consider their ability to repay counsel fees.

In *James*, the Supreme Court reached only the first of these two issues, holding that Kansas's recoupment system violated the Equal Protection Clause by "strip[ping] from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors." *James,* 407 U.S. at 135. Conversely, *Fuller* upheld Oregon's recoupment statute against both challenges, finding no Equal Protection Clause violation because a "convicted person * * * retains all the exemptions accorded other judgment debtors," and finding no undue burden on the Sixth Amendment because the statute was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and *to enforce that obligation only against those who actually become able to meet it without hardship*." *Fuller,* 417 U.S. at 47, 54 (emphasis added).[3] This second issue is the one implicated by the present case. The Second District's holding is consistent with *Fuller*'s analysis of the procedural protections a recoupment statute must have to avoid infringing on the Sixth Amendment. For Ohio's recoupment system to pass constitutional muster under *Fuller*, the trial court hearing an R.C. 2947.23(C) motion must

[3] In *State v. White*, this Court upheld assessment of court costs under R.C. 2947.23 over an Equal Protection challenge. 2004-Ohio-5989, 103 Ohio St. 3d 580, 817 N.E.2d 393 ¶ 10-13 . But importantly, the *White* Court was not asked to evaluate *James* and *Fuller*'s second claim: that compelling payment of court costs from indigent defendants would unduly chill exercise of Sixth Amendment rights. *White* expressly reserved that question, stating "[w]e will not * * * speak to the legality of the several avenues for collection from an indigent defendant, as those questions are not before us." *Id.* at ¶ 15. This second question is squarely implicated in the present case.

evaluate ability to pay in order to ensure that payment is "enforce[d] * * * only against those who actually become able to meet it without hardship." *Fuller*, 417 U.S. at 54.

In upholding Oregon's statute, the *Fuller* Court examined "several conditions [that] must be satisfied before a person may be required to repay the costs of his legal defense," including the protection that "a convicted person under an obligation to repay may at any time petition the court … [which is] is empowered to remit if payment will impose manifest hardship on the defendant or his immediate family." 417 U.S. at 45-46 (internal quotation marks and citation omitted). That is precisely the mechanism made available by the Ohio legislature under R.C. 2947.23(C), which Dunson seeks to invoke here.

The U.S. Court of Appeals for the Fourth Circuit has described "five basic features of a constitutionally acceptable attorney's fees reimbursement program," deriving from the Supreme Court's pronouncements in *James*, *Fuller*, and *Bearden*. *Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984). Among these elements:

> [T]he entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent.
>
> *Id*.

In *Alexander*, North Carolina's recoupment system passed muster because it required the trial court to "consider[] the resources of the defendant, [including] his ability to earn, [and] his obligation to support dependents" before ordering repayment, and left the trial court "free to recommend reduced or partial restitution when the actual debt outstrips the defendant's ability to pay." *Id*. at 125 (citations omitted). Those same considerations support the decision below.

2. The weight of authority confirms that trial courts must consider ability to pay before collecting court costs.

The Second District's ruling below is also consistent with a broad consensus in authority from sister jurisdictions, which similarly require trial courts to consider a defendant's ability to pay when evaluating court costs. Under the State's theory here, (1) the trial court must enter a judgment for costs of prosecution under R.C. 2947.23 regardless of an indigent defendant's ability to pay, (2) the clerk of court may then attempt collection from an indigent prisoner's account regardless of ability to pay, *White*, 2004-Ohio-5989, ¶ 14, then (3) when a defendant seeks relief on grounds of indigence pursuant to R.C. 2947.23(C), the trial court may deny the motion without regard for ability to pay. Amici have identified no other jurisdiction that permits the State to disregard indigence in this manner at every stage. To the contrary, other jurisdictions emphasize ability-to-pay procedures as integral to the legality of recoupment laws.[4] This apparent consensus in authority demonstrates that the State's theory here is an outlier that, if adopted, would violate defendants' Sixth Amendment rights.

Though much of the relevant precedent involves the closely-related context of recoupment of public defender fees, decisions from sister jurisdictions apply the same analysis to the costs of prosecution associated with jury trials. *See, e.g., State v. Moore*, 2012 MT 95, 365 Mont. 13, 277 P.3d 1212 at ¶ 18 (2017), ("[C]ourts cannot * * * [impose] costs of jury service to indigent defendants without first scrupulously and meticulously determining the defendant's ability to pay those costs.") (internal citations omitted); *Ohree v. Com.*, 26 Va. App. 299, 311,

[4] Some cases from the jurisdictions cited rely upon state statutory and constitutional provision in addition to the Sixth Amendment in determining that an ability to pay determination is required. But the overall consensus is that a trial court must consider ability to pay recoupment costs at some stage of the proceedings.

494 S.E.2d 484 (1998) (penalizing any defendant unable to pay the costs of prosecution would be "unconstitutional under *Fuller*" and "would constitute an abuse of discretion.")

The vast majority of jurisdictions Amici examined require an ability-to-pay determination at some point before collection. A majority have held that recoupment costs may not be initially assessed absent a prior ability-to-pay determination.[5] Some of the minority of courts have found it constitutionally permissible to *initially* impose court costs on defendants without considering ability to pay, but these decisions have emphasized that such costs may not be *collected* without first determining ability to pay. *See People v. Jackson*, 483 Mich. 271, 292–93, 769 N.W.2d 630 (2009) ("[O]nce enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability to pay, the trial courts should evaluate the defendant's ability to pay."); *State v. Blank*, 131 Wash. 2d 230, 242, 930 P.2d 1213 (1997) ("[W]e hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay."); *State v. Albert*, 899 P.2d 103, 112 (Alaska 1995). The State's position is an extreme outlier and, if adopted, would render the statute unconstitutional.

C. REVERSAL WOULD EXACERBATE ONGOING ABUSES OF PRISONERS AND INHIBIT INCARCERATED OHIOANS FROM SUCCESSFUL REENTRY.

Aggravating the constitutional concerns discussed *supra*, reversal of the Second District's decision would create bad public policy that would keep formerly incarcerated Ohioans in debt and inhibit prisoner reentry. Extracting costs from indigent defendants through prison account

[5] *See, e.g.*, *Olson v. James*, 603 F.2d 150, 155 (10th Cir.1979); *Fitch v. Belshaw*, 581 F.Supp. 273, 277 (D.Or.1984); *State v. Tennin*, 674 N.W.2d 403, 410–11 (2004); *People v. Love*, 177 Ill. 2d 550, 563, 687 N.E.2d 32 (1997); *See also Hanson v. Passer*, 13 F.3d 275, 279 (8th Cir.1994); *State v. Drayton*, 285 Kan. 689, 175 P.3d 861 (2008); *State v. Ellis*, 339 Mont. 14, 167 P.3d 896, 900 (2007); *State v. Morgan*, 173 Vt. 533, 789 A.2d 928, 931 (2001); *In re Attorney Fees in State v. Helsper*, 297 Wis.2d 377, 724 N.W.2d 414, 418–20 (Ct.App.2006); *State v. Miller*, 111 Ariz. 558, 559, 535 P.2d 15 (1975).

garnishment not only exacerbates poverty, it also produces unduly harsh conditions of confinement. It places defendants—and their families—in positions of intense financial instability which makes successfully exiting the prison system even more difficult. To collect costs from indigent prisoners harms the people living in this state.

1. Garnishment of prison commissary accounts, funded by prison labor or family contribution, creates a barrier to reentry after incarceration.

Imposing punitive financial obligations on poor people draws them into a cycle of poverty that is both unnecessary and cruel. The cycle of poverty caused by any revenue extraction on the most economically vulnerable is amplified when the debt derives from the so-called "user fees" imposed to pay for the costs of the justice system.

It is well established that financial instability is a major contributor to criminal activity recidivism. *See, e.g.,* U.S. Dep't of Justice, *Economic Perspectives on Incarceration and the Criminal Justice System* (April, 2016) at 34 available at http://bit.ly/2pRvspg (last accessed Feb. 5, 2018). Access to housing, employment, and family support are understood as the other major contributors—and each is impacted by financial status. *Id.*

The State itself acknowledges that "[a]n inmate in prison will likely not make much money, perhaps less than he or she did before being convicted of a felony and incarcerated." State's brief at 14. It is self-evident that prisoners are more likely to be poor than free people both during and after their incarceration. *See, e.g.,* White House Council of Econ. Advisers, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor,* at 4 (December 2015), available at http://bit.ly/2E4CNK2 (last accessed Feb. 5, 2018). People in prison obviously do not have the opportunity to earn wages that are even close to the minimum wage available to free individuals in the labor force. Prison Policy Initiative, *How much do incarcerated people earn in each state?* (April 10, 2017) available at

http://bit.ly/2EjsSiY (last accessed Feb. 5, 2018). Ohio prisoners working in industrial or vocational programs earn an average of $0.21 to $1.23 hourly. *Id.* And then, upon exiting the prison system, these individuals have difficulty maintaining employment, in part because of laws making people with criminal histories unemployable. *See, e.g.*, Loretta Lynch, U.S. Dep't of Justice, *Roadmap to Reentry* (April 2016) available at http://bit.ly/2FNqYnS (last accessed Feb. 5, 2018). It is poor policy for the State to take the limited money prisoners like Dunson have when it only sets them up for failure.

Debt collection from prison commissary accounts also has ramifications beyond its impact on prisoners; it bleeds into the lives of prisoners' families to the detriment of both the family and the formerly incarcerated individual seeking to reenter society.

Prison commissary accounts are generally funded through menial wages from prison labor, and for many prisoners, help from family members who are free. *See, e.g.* deVuono-powell, et al., Ella Baker Ctr. for Human Rights, *Who Pays? The True Cost of Incarceration on Families* (Sept. 2015), available at http://bit.ly/1M9n7ja (last accessed Feb. 5, 2018). Families contributing to prison accounts "undoubtedly deprive themselves of funds that could be devoted to the purchase of necessities for them and their children." *Dean v. Lehman*, 18 P.3d 523, 540 (2001).

Attempting to obtain court costs from indigent prisoners will necessarily end up extracting the paltry amount of wealth that prisoner's family possesses.

The recoupment of costs from an incarcerated person who is unable to pay also creates instability in the individual's family life, which itself poses a barrier to reentry since family support is a key indicator of whether an individual will recidivate. *See* Kirsten D. Levingston and Vicki Turetsky, Brennan Center for Justice, *Debtors' Prison—Prisoners' Accumulation of Debt*

as a Barrier to Reentry, Clearinghouse Review Journal of Poverty Law and Policy at 192 (July-August 2007). Stress on that person's relationships and security result, and upon exiting the criminal justice system, the individual's chance of success diminishes. Allowing the garnishment of prison commissary accounts without regard for an individual's ability to pay therefore not only impacts the almost 50,000 people in Ohio's prisons, but their families and communities.

2. Collecting excessive debt from state prisoners can produce abusive conditions of confinement that implicate the Eighth Amendment.

When the State sentences criminal defendants to prison and jail terms, the punishment is their deprivation of liberty—one of the most serious penalties available. Even where denial of liberty is allowed, the Eighth Amendment requires "humane conditions of confinement," including, "adequate food, clothing, shelter and medical care." *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1979, 128 L.Ed.2d. 811 (1994). "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones." *Id.* citing *Rhodes v. Chapman*, 452 U.S 337, 349, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)

When the State places its prisoners in a situation where they cannot meet their basic human needs—when they are hungry or thirsty; when they are in danger; when they are sick and cannot access medicine—the State creates inhumane conditions. The State does this when it assigns a criminal defendant a debt so severe, it deprives him of the ability to satisfy basic needs by extracting from his commissary account the scant funds he can earn as debt repayment.

Researchers have documented that "growing inmate populations and rising levels of privatization * * * have led to" shifting costs of necessities including food and medical services to prisoners. Gibson-Light, Michael, *Ramen Politics: Informal Money and Logics of Resistance in the Contemporary American Prison*, 41 *Qualitative Sociology* 2, 5 (forthcoming). This forces prisoners to depend on prison labor wages to access food and medicine at commissary stores, to

supplement needs that are not being met through the prison structure. This study also found that the food scarcity resulting from prisoner poverty has generated an informal prison economy that fosters other illegal activities including violence over food. *Id.* at 7. Extracting any portion of the meager sum that a state prisoner is able to maintain in a commissary account to pay a debt can, as in Dunson's case, prevent that person from being able to meet basic needs.

In December 16, 2017, the ACLU of Ohio interviewed two formerly imprisoned individuals who recalled their state of persistent hunger while confined in Cuyahoga County Jail. It was customary for these two young men to impose rations on themselves of the inadequate food that the jail cafeteria supplied to them. They would put their lunchtime milk inside jail-issued laundry bags for when they would become hungry, and hide it in their toilet to keep it from spoiling. Milk was a key commodity because of its caloric and nutritional value, they said. Interview with ACLU of Ohio, December 16, 2017, Hot Sauce Williams, Cleveland, Ohio.

Imprisoned Ohioans require *some* funds to purchase food, plus basic hygiene and medical supplies, and they need to pay a $3-4 copay for any medical access at all. Affidavit of James Dunson. In Dunson's motion to modify costs here, he enumerates what he needs his commissary fund to purchase: medical copays, medical supplies, and hygiene items that could cost between $11 and $21.36 monthly. At his prison labor wage of between $17 and $21 monthly, even assuming family or community members could contribute any assistance, Dunson is barely able to meet his basic needs *even before* his account is garnished for court costs. This is without accounting for access to food. It is not a matter of being able to afford some luxury—a book, or a pen—or some illicit indulgence—a cigarette. This is a matter of basic need. The trial court's refusal to consider these realities when evaluating Dunson's motion to modify his costs will result in an inhumane condition of confinement.

Worse still, it is well established that inhumane confinement can produce mental health problems or worsen existing ones, and about one third of Ohio's prisoners suffer from mental illness. *See* Ohio Dept. of Rehabilitation and Correction, 2014 Intake Study (Aug. 2015) available at http://bit.ly/2FJwS9B (last accessed Feb. 5, 2018); H.J. Steadman, *et al.*, *Prevalence of Serious Mental Illness Among Jail Inmates*, Psychiatric Services 60, no. 6 (June 2009): 761–765. Indebtedness in any context causes stress and exacerbates mental illness, even for free people. E.g., Elina Turunen and Heikki Hiilamo, *Health Effects of Indebtedness: a Systematic Review*, 14 BMC Public Health 489 (May 2014). The stacking of conditions of confinement with criminal justice debt, especially upon a population that is already more likely to experience mental illness, leads to concrete consequences including heightened risk of suicide and self-harm. Extreme stress and mental illness are also significant barriers to reentry. *See* ACLU of Ohio and Ohio Justice and Policy Center, *Looking Forward: a Comprehensive Plan for Criminal Justice Reform in Ohio* (2016) available at http://bit.ly/2GNxVqd (last accessed Feb. 5, 2018). The mental health effects of indebtedness, compounded by lack of access to basic food and medical care, create cruel conditions of confinement, and make Ohio's prisons non-rehabilitative, and ultimately inescapable.

D. CONCLUSION

Amici urge this Court to affirm the Second District's ruling, and hold that trial courts must assess a criminal defendant's present and future ability to pay when considering a post-conviction motion to modify court costs. As a statutory matter, a constitutional matter, and a matter of public policy, a trial court's continuing jurisdiction over court costs must include that it consider the defendant's ability to pay.

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CERTIFICATE OF SERVICE

I certify that on February 6, 2017, I filed the foregoing via the Court's electronic filing system, and I served a copy of this brief by e-mail to Patrick Clark, Counsel of Record for Appellee, at patrick.clark@opd.ohio.gov, and to Meagan Woodall, Assistant Montgomery County Prosecutor, at WoodallM@mcohio.gov.

/s/ Elizabeth Bonham
Elizabeth Bonham (0093733)

EXHIBIT A

The Supreme Court of Ohio

65 South Front Street, Columbus, OH 43215-3431

Chief Justice
Maureen O'Connor

Justices
Terrence O'Donnell
Sharon L. Kennedy
Judith L. French
Patrick F. Fischer
R. Patrick DeWine
Mary DeGenaro

Chief Justice
Maureen O'Connor

Telephone 614.387.9060
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January 29, 2018

Dear Judges:

I am aware that the U.S. Department of Justice recently rescinded its March 14, 2016, guidance to state court leaders concerning fine, fee, and bail practices. That guidance reminded state court leaders of our obligation to follow the constitutional standards articulated in *Beardon v. Georgia*, 461 U.S. 660 (1983). Notwithstanding the rescission of the guidance by the Department, the constitutional requirements of *Beardon* remain unaltered. As state court leaders, our independent obligation to ensure that our practices fully comport with both state and federal constitutional standards remains. The U.S. Supreme Court observed over 100 years ago, "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States." *Robb v. Connolly*, 111 U.S. 624, 637 (1884). That obligation is as relevant and binding today as it was in 1884.

As many of you know, for the past two years I have co-chaired a national task force examining fine, fee, and bail practices to make recommendations for how state courts can bring such practices into greater alignment with constitutional standards. The need for the task force was the result of unfortunate practices in some state and local courts where fine, fee, and bail systems essentially operated on "automatic pilot" with little, if any, regard for fundamental constitutional rights. Oftentimes these practices emerged within courts as a result of funding pressures by government authorities. Providing adequately funded and effective justice system is a fundamental obligation of government, as fundamental as providing schools, roads, fire protection, and law enforcement.

Here in Ohio I have spoken out unequivocally that courts are centers of justice, *not* automatic teller machines whose purpose is to generate revenue for governments, including themselves. This is such an important issue affecting our judicial system that I requested our staff to prepare and disseminate to you bench cards (adult and juvenile) containing the legal guidelines for appropriate fine and cost collection methods. Moreover, our Judicial College prepared an online course on this topic. The course is *The Cost of Justice: Fines and Fees* and it provides 1.50 hours of continuing judicial education credit. You may register and take the course at the Judicial College online registration site. I urge you to take this course and use the bench cards to guide your practice.

I know the pressure that many of you face to generate revenue, to increase collection rates, to "self-fund" as if the courts are a business trading in a commodity. But court cases are not business transactions. We do not buy and sell a commodity; we perform a public service. Nevertheless, focus on the "business" of the courts appears at times to be overtaking interest in our fundamental responsibility to do justice. For example, after reviewing an audit report last year concerning a municipal court in this state, I became so concerned about the emphasis on the

"business of the court" that I wrote directly to the State Auditor David Yost expressing my deep distress. I stated the following in my letter:

> Finally, the overall tone of the audit report is troublesome because of the underlying assumption that court fines and fees are merely opportunities for revenue enhancement. . . . Pressure that courts self-fund can create a system of justice that is premised on a "pay-as-you-go" model, not the principle that courts and the administration of justice are a fundamental and general obligation of government. If the existence of a court is dependent upon self-funding, we run the danger of creating a system of built-in incentives for courts to use judicial power for self-preservation not the promotion of justice for all. . . . Judges and court staff cannot be seen as collection agents. Whether courts contribute to a city's bottom line or generate sufficient cash flow for its own operations should not be even a secondary thought considering the role of the judiciary in our system of government.

Shortly after receiving my letter, Auditor Yost contacted me emphasizing his support for the principle that the courts' fundamental and unquestionable responsibility is to ensure that justice is done. We should not be expected to engage in practices designed to maximize revenue by taking advantage of our citizens or ignoring basic constitutional standards. He committed to me that he would begin a program of educating his auditor staff and contract auditors to consider the appropriate role of the judiciary in any review.

Notwithstanding the rescission of the Department of Justice's guidance letter of March 14, 2016, our role as state judges *does not change*. We are as responsible for both abiding by and protecting constitutional rights as are our federal counterparts. Indeed, because of the sheer volume of cases and constant contact with our fellow citizens, we have a special responsibility to act in a manner that bolsters public trust and confidence in the fair administration of justice for everyone. Practices that penalize the poor simply because of their economic state; that impose unreasonable fines, fees, or bail requirements upon our citizens to raise money or cave to local funding pressure; or that create barriers to access to justice are simply wrong. No rescission of guidance by the Department changes that.

I urge you to remain committed to ensuring that our courts' practices remain fully compliant with constitutional standards and that we continue to act in a manner that increases confidence in the fairness of our justice system. "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States."

Thank you for your service to the citizens of Ohio and your continued commitment to the fair and constitutionally appropriate administration of justice.

Sincerely,

Maureen O'Connor
Chief Justice